

D.T.E. 99-101

Petition of Western Massachusetts Electric Company for Approval of a Termination Agreement with MASSPOWER, pursuant to an Act Relative to Restructuring the Electric Utility Industry, G.L. c. 164, §§ 1A et seq.

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FINAL ORDER

APPEARANCES: Steven Klionsky, Esq.

260 Franklin Street, 21<sup>st</sup> Floor

Boston, MA 02110

FOR: WESTERN MASSACHUSETTS ELECTRIC COMPANY

Petitioner

Thomas F. Reilly, Attorney General

By: Joseph Rogers

Assistant Attorney General

200 Portland Street

Boston, MA 02114

I. INTRODUCTION

On October 5, 2000, Western Massachusetts Electric Company ("WMECo" or

"Company") and the Attorney General, pursuant to G.L. c. 164, §§ 1A, 1(G), 76, 94, and 94A ("Act") and 220 C.M.R. §§ 8.00 et seq., submitted to the Department of Telecommunications and Energy ("Department") a Joint Motion for Approval of an Offer of Settlement ("Motion") and an Offer of Settlement ("Settlement") concerning the termination of the Company's Power Purchase Agreement ("PPA") with MASSPOWER, Inc. ("MASSPOWER").<sup>(1)</sup> Concurrently, the Company filed a Motion for Protective Treatment, pursuant to G.L. c. 25, § 5D, wherein they requested that the buyout amount of the MASSPOWER contract be kept confidential and not publicly disclosed.

## II. MOTION FOR PROTECTIVE TREATMENT

- Introduction

Pursuant to G.L. c. 25, § 5D, WMECo filed a Motion for Protective Treatment of the buyout amount that it proposes to pay to MASSPOWER to terminate its PPA. As a basis for the Motion, the Company contends that disclosure of the buyout amount would materially damage future negotiations that WMECo might have regarding power purchases since the buyout amount is an indication of how WMECo and MASSPOWER forecast the price of electricity over the contract term (Motion for Protective Treatment at 3). Moreover, WMECO argues that disclosure of this information could negatively impact future negotiations thereby frustrating the legislative directive to negotiate the modification or termination of high power contracts (id. at 4).

### B. Standard of Review

Information filed with the Department may be protected from public disclosure

pursuant to G.L. c. 25, § 5D, which states in part that:

the [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4,

§ 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth (a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute

"trade secrets, [or] confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its

non-disclosure; and third, even where a party proves such need, the Department may protect

only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D details the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also, Standard of Review for Electric Contracts, D.P.U.

96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing).

### C. Analysis and Findings

The Department has found previously that protection from public disclosure of a buyout amount is appropriate since that information is an indication of a company's forecast of market prices for power, projected market electricity prices, capacity factors and discount rates. See, e.g., Boston Edison Company, D.T.E. 99-16 (1999); Western Massachusetts Electric Company, D.T.E. 99-56 (1999). In PPA buyout negotiations, both parties compete with one another to see who can get the better outcome. The PPA at issue here is but one of several that WMECo may negotiate. Disclosing the results here would permit future negotiating opponents to make inferences about WMECo's confidential negotiating

strategy. Given the confidential nature of this competitively sensitive material, the Department finds that public disclosure of the buyout amount could prove detrimental to WMECo, because it might seriously undermine the Company's ability to maximize mitigation efforts and substantially harm WMECo's negotiating position for other PPAs. Accordingly, the Department finds that WMECo has provided sufficient reasons to protect from the public disclosure, pursuant to G.L. c. 25, §5 D, the buyout amount that the Company proposes to pay to MASSPOWER to terminate the PPA, and approves the Motion for Protective Treatment.

Upon the completion of all of WMECo's power purchase agreement buyouts and

re-negotiations, the § 5D protection accorded here will terminate without further action of the Department. See Western Massachusetts Electric Company, D.T.E. 99-56 (1999); see also, Boston Edison Company, D.T.E. 99-16 (1999).

### III. SETTLEMENT AGREEMENT

#### ○ Description

In 1991, WMECo and MASSPOWER entered into a PPA that was approved by the Department (Settlement at 1). Pursuant to this PPA, WMECo purchases annually approximately 22.5 percent of the capacity and associated electric energy produced by MASSPOWER, at an energy purchase rate currently equal to \$0.014 per kilowatthour ("KWH") and a capacity purchase rate currently equal to \$28.50 per kilowatt per month ("KW-month") (id. at Exhibit 1). The PPA is scheduled to terminate July 30, 2008 (Settlement at 1).

WMECo contends that the cost of capacity and associated energy under the PPA is above the market price of power and WMECo projects it will remain above the market price for the remaining term of the PPA (Exhibit 1 at 1). The Settlement provides for the buyout of the MASSPOWER PPA for an amount that the Parties agree would likely achieve savings for WMECo's customers (Settlement at 3). Moreover, the Settlement provides that WMECo would credit customers in full, in its transition charge reconciliation filing, all monies accrued as a result of tax benefits related to the timing of the buyout payment (id. at 3-4).

Finally, the Settlement specifies that WMECo may recover the buyout payment and associated transaction costs as actual and fully mitigated transition costs in WMECo's transition charge, and that the buyout payment would be eligible to be included by WMECo in any application for securitization, pursuant to G.L. c. 164, § 1H (id. at 4).

#### B. Standard of Review

G.L. c. 164, § 1 et seq., requires electric companies to seek to mitigate transition costs, including, as one mitigation method, the renegotiation of above-market PPAs.

G.L. c. 164, § 1G(d)(1)-(2). The Act further provides that if a negotiated contract buyout is likely to achieve savings to ratepayers and is otherwise in the public interest, the Department is authorized to approve the recovery of the costs associated with the contract

buyout. G.L. c. 164, § 1G(d)(2)(ii); see also G.L. c. 164, § 1G(b)(1)(iv). The Department's regulations do not prohibit a company from negotiating a release from the obligations it has incurred, but such releases are subject to the Department's review. Altresco-Lynn, Inc. and Altresco-Pittsfield L.P., D.P.U. 91-142; and Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 91-153, at 15 (1991).

In assessing whether to approve a Settlement Agreement, the Department must address its reasonableness. To determine the reasonableness of a Settlement Agreement, the Department must review all available information to ensure that the agreement is consistent with the public interest. Commonwealth Electric Company, D.P.U. 91-200, at 5 (1993); Boston Edison Company, D.P.U. 92-183 (1992) (Department approval of a termination agreement of a power purchase contract with Down Easter Peat, L.P.).

### C. Analysis and Findings

Termination of the Company's PPA with MASSPOWER is likely to achieve savings for WMECo's customers. Additionally, any tax benefits that result from the timing of the buyout payment would be credited to WMECo's ratepayers under the Settlement's terms.

Determining whether a buyout amount is reasonable must be based on forecasts of energy prices that are characterized by uncertainty. Even allowing for such inherent uncertainty, the information filed with the Department in this proceeding establishes that the Settlement Agreement as a fair and arm's-length resolution of the issues related to the Company's PPA with MASSPOWER. Accordingly, the Department finds that the Settlement is reasonable and in the public interest. Therefore, the Joint Motion for Approval of an Offer of Settlement and the Offer of Settlement is approved.

## IV. ORDER

Accordingly, after due notice, opportunity for public comment, and consideration, it is hereby

ORDERED: That the Joint Motion for Approval of a Settlement submitted by Western Massachusetts Electric Company and the Attorney General is approved; and it is

FURTHER ORDERED: That Western Massachusetts Electric Company's Motion for Protective Treatment is approved.

By Order of the Department,

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James Connelly, Chairman

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).

1. On November 16, 1999, WMECo submitted for the Department's approval, a proposal to terminate its PPA with MASSPOWER. The Attorney General opposed the approval of the Company's proposal (Settlement at 2). After discussions between the Company and the Attorney General, the Parties jointly sponsored the Motion and Settlement that is the subject of this Order.